U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 0 6 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:

Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center (Director). It is now on appeal before the Acting Chief, Administrative Appeals Office (AAO). The Director's decision will be withdrawn, and the petition remanded for a new decision.

The petitioner is an information technology (IT) consulting company. It seeks to permanently employ the beneficiary in the United States as a technology program manager and to classify him as an advanced degree professional pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). This section of the Act provides for immigrant classification to members of the professions holding advanced degrees or their equivalent whose services are sought by an employer in the United States. The regulation at 8 C.F.R. § 204.5(k)(2) defines "advanced degree" as follows:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.

The petitioner filed its Form I-140, Immigrant Petition for Alien Worker, on July 5, 2011. The petition was accompanied by an Application for Permanent Employment Certification, ETA Form 9089, that was filed with the Department of Labor (DOL) on April 9, 2011, and certified by the DOL on June 2, 2011. The ETA Form 9089 specifies that the minimum education required for the proffered position is a master's degree in engineering or a "foreign educational equivalent" (Part H, lines 4, 4-B, and 9), and that the minimum experience required is two years in the "job offered" or in the alternate occupation of programmer analyst (Part H, lines 6, 10, 10-A, and 10-B). The ETA also specifies that no alternate combination of education and experience is acceptable (Part H, line 8).

On November 14, 2011, The Director, Texas Service Center (Director), denied the petition on two grounds: (1) the failure of the petitioner to establish its continuing ability to pay the instant beneficiary as well as all the other beneficiaries of pending and approved Form I-140 petitions, and (2) the failure of the petitioner to establish that – as successor-in-interest to - has a *bona fide* job opportunity available to the beneficiary.

The petitioner filed a timely appeal along with a brief from counsel and additional documentation that addressed the grounds for denial. The appeal is now before the AAO, which conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004).

To be eligible for approval as an employment-based immigrant, a beneficiary must have all the education, training, and experience specified on the labor certification as of the petition's priority date, which is the date the underlying labor certification was accepted for processing by the DOL. *See Matter of Wing's Tea House*, 16 I&N 158 (Act. Reg. Comm. 1977); *see also* 8 C.F.R. § 204.5(d). The priority date of the instant petition, therefore, is April 9, 2011.

Based on the entire record, the AAO finds that the beneficiary's educational credentials from India earned in the years 1984 to 1993 – which included a Secondary School Certificate, a three-year Diploma in Civil Engineering from , a three-year Bachelor of Technology in Civil Engineering from , and a two-year Master of Technology in Water Resources Engineering from – are comparable to a master's degree in the field of engineering from an accredited university in the United States. In addition, based on letters from former supervisors of the beneficiary at companies where he worked as a programmer analyst in the years 2006-2010, as well as the service contracts and tasking orders under which the beneficiary performed those services, the AAO finds that the beneficiary more likely than not had more than two years of qualifying experience before the priority date of April 9, 2011. Thus, the beneficiary meets the educational and experience requirements of the labor certification and the petition.

However, the petitioner must also establish its continuing ability to pay the proffered wage from the priority date up to the present. The regulation at 8 C.F.R. § 204.5(g)(2) states as follows:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

As previously discussed, the priority date in this case is April 9, 2011. The offered wage of the technology program manager, as stated in Box G of the ETA Form 9089, is $116,600.00 per year.

The evidence of record shows that the original petitioner – . – merged with on June 21, 2011. The latter company was the surviving entity. For the period of April 9, 2011 to June 21, 2011, therefore, the petitioner must establish that had the ability to pay the proffered wage. After the merger date the ability to pay the proffered wage must be established by

The record also shows that is the parent of , and was the parent of as well before its merger with In the initial NOID, however, the Director stated incorrectly that merged into In the second NOID the Director corrected the misstatement about the merger parties, but did not distinguish between and its parent company, in discussing the evidence in the record of the petitioner's ability to pay the proffered wage. The same error was made in the denial decision, in which the Director once again failed to distinguish between the parent and

the subsidiary in analyzing the documentation of record and determining that the petitioner had not established its ability to pay the proffered wage of the instant beneficiary, as well as all other beneficiaries of pending and approved Form I-140 petitions. The parent corporation – – is not the petitioner. Therefore, its tax returns and other financial data are not relevant in determining the ability to pay of its subsidiaries, and its predecessor-in-interest.[1]

Because a corporation is a separate and distinct legal entity from its owners and shareholders, the assets of its shareholders or of other enterprises or corporations cannot be considered in determining the petitioning corporation's ability to pay the proffered wage. *See Matter of Aphrodite Investments, Ltd.*, 17 I&N Dec. 530 (Comm'r 1980). The court in *Sitar v. Ashcroft*, 2003 WL 22203713 (D.Mass. Sept. 18, 2003) stated, "nothing in the governing regulation, 8 C.F.R. § 204.5, permits [U.S. Citizenship and Immigrations Services] to consider the financial resources of individuals or entities who have no legal obligation to pay the wage."

Furthermore, since the federal income tax return of the petitioner's parent is irrelevant, the Director should have considered the August 1, 2011 statement from the petitioner's chief executive officer, , without reference to data on Form 1120 (for the year 2010). In his statement asserted that currently employed 150 workers and had the ability to pay the proffered wage to the beneficiary. The Director evaluated statement in the second NOID, and discounted its evidentiary weight in light of certain data on the parent company's income tax return. This analysis was faulty. The probative value of the statement should have been weighed based on the petitioner's economic data. In the Director's decision statement was ignored.

As for the *bona fides* of the job opportunity, the Director did not address the evidence submitted by the petitioner in response to the second NOID. That evidence consisted, in particular, of the offer letter co-signed by the petitioner's human resources manager and the beneficiary on July 1, 2011.

For the reasons discussed above, the AAO will remand this petition to the Director for further consideration of the *bona fides* of the proffered position and the petitioner's ability to pay the proffered wage. In connection with this review the Director will also have the opportunity to consider the additional evidence submitted by the petitioner on appeal, including documentation pertaining to the proffered wages and wages paid to other beneficiaries of pending Form I-140 petitions filed by .

The burden of proof in these proceedings rests solely with the petitioner. *See* Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met its burden.

ORDER: The Director's decision of November 14, 2011, is withdrawn. The petition is remanded to the Director for further consideration of whether the petitioner has established (1) that a *bona fide* job opportunity exists for the beneficiary, and (2)

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[1] The federal employer identification number (FEIN) of the parent, is The FEIN of the current petitioner – – is The FEIN of the original petitioner –

the ability of (from April 9 to June 21, 2011) and (from June 21, 2011 onward) to pay the proffered wage of the instant beneficiary, as well as the proffered wages of all other pending and approved Form I-140 petitions filed by the two companies. The Director may request additional evidence from the petitioner, if so desired, and prescribe a time period for its submission. A new decision will then be issued by the Director.